

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHELDON ROYCE MARCH,

Defendant-Appellant.

UNPUBLISHED

April 9, 1999

No. 204178

Genesee Circuit Court

LC No. 96-053932 FC

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of armed robbery, MCL 750.529; MSA 28.797, one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2)¹. Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to concurrent terms of thirty to sixty years' imprisonment for the armed robbery and assault convictions, to be served consecutive to concurrent two-year terms for the felony-firearm convictions. He appeals as of right, and we affirm.

I

Defendant's convictions arose from two separate incidents. In the first incident, a victim and her cousin were assaulted by two men in a residential driveway. In the other incident, on the same day, Angie Plunkey and her mother were assaulted, and the mother was shot, after leaving a wedding reception. Defendant first argues that there was insufficient evidence to support his convictions for assault with intent to commit armed robbery and felony-firearm involving one of the victims, Angie Plunkey. Specifically, defendant contends that the evidence failed to establish that he gave aid or encouraged codefendant in the crime against Plunkey. We disagree. When reviewing the sufficiency of the evidence in a criminal case, "we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of assault with intent to commit armed robbery are: “(1) an assault with force or violence; (2) an intent to rob or steal; and (3) the defendant’s being armed.” *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). A conviction for felony-firearm requires proof that defendant carried or possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b; MSA 28.242(2); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that a defendant aided and abetted a crime, the prosecutor must establish that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or encouraged or assisted the principal in committing the crime, and (3) the defendant intended the commission of the crime or knew the principal intended its commission at the time he gave aid or encouragement. *Id.* An aider and abettor’s state of mind may be inferred from all the facts and circumstances. *Id.* at 568-569.

Viewed in a light most favorable to the prosecution, we conclude that the evidence was sufficient to establish that defendant assisted or encouraged codefendant in perpetrating an assault with intent to commit armed robbery against Plunkey. According to the testimony of an accomplice, defendant responded to codefendant’s statement, “let’s get these bitches”, by speeding toward the victim’s car and accepting a gun from codefendant. Defendant and codefendant then exited defendant’s vehicle; codefendant went after Plunkey and defendant went after the other victim. The evidence demonstrated that defendant and codefendant were looking for people to rob on the night in question. From this evidence the jury could infer that defendant both intended to commit the offenses against Plunkey and knew that codefendant intended their commission. Although defendant denied any involvement in the crimes at trial, the jury did not believe him. We will not interfere with assessments of credibility made by the factfinder. *Wolfe, supra* at 514-515.

II

Defendant also argues two errors with regard to the jury instructions. Neither of these issues are preserved because defendant did not object to the instructions as given and thus, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

First, defendant argues that the trial court erred in refusing to give CJI2d 4.4, the standard jury instruction on flight, which provides that a defendant’s flight after an offense is equally consistent with innocence as with guilt². Defendant contends that the court’s refusal to give the instruction interfered with the jury’s right to determine what caused defendant to flee the police and excluded a material issue from their consideration. We disagree. Flight was not a material issue in this case. Neither defense counsel nor the prosecution argued that defendant’s flight from the police was probative of guilt or innocence. Defendant defended the case by attacking the credibility of the prosecution witness who implicated him, and arguing that he did not participate in the crimes. Thus, although there was evidence that defendant fled the scene, the trial court was under no obligation to include an instruction that did not concern a material issue in the case. See *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Further, even if the failure to give the instruction was error, it was harmless. Without the

instruction, the jury was not informed that it could consider defendant's flight as consciousness of guilt. The jury was simply not called upon to weigh the flight evidence one way or the other. More importantly, the instructions, taken as a whole, sufficiently protected defendant's rights, and we find no manifest injustice. *People v Dunham*, 220 Mich App 268, 274-275; 559 NW2d 360 (1996).

Second, defendant contends that when the trial court misspoke and accidentally inserted the phrase "fingerprints prove" into the standard jury instruction on fingerprint evidence, it confused the jury and essentially instructed them that defendant committed the crime. We disagree. After a thorough review of the instructions, we find no manifest injustice resulting from the trial court's misspeaking. The trial court began to misspeak in the middle of the fingerprint instruction. It then stopped and began to read the remaining portion of the instruction over again, which it did correctly. Even if the instruction was somewhat imperfect, there was no error because the instructions as a whole fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997).

III

Defendant claims that the prosecution impermissibly suggested to the jury that his silence between post arrest statements was evidence of guilt. Although defendant failed to object to the prosecutor's comments during closing arguments, review is nevertheless appropriate because a significant constitutional question is involved. *People v Schollaert*, 194 Mich App 158, 162; 486 NW2d 312 (1992). We must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether defendant was denied a fair trial. *Id.*

A prosecutor may not use a defendant's exercise of his Fifth Amendment right to remain silent against him at trial. *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973). However, the Fifth Amendment does not preclude substantive use of evidence concerning a defendant's behavior and demeanor during a custodial interrogation after his valid waiver of the right against compelled self-incrimination and prior to his invoking his right to remain silent. *People v McReavy*, 436 Mich 197, 203, 221-222; 462 NW2d 1 (1990). When a defendant speaks after receiving *Miranda*³ warnings, any subsequent silence is not automatically construed as an affirmative invocation by the defendant of the right to remain silent. *Id.* at 211-212, 222.

Here, the record indicates that at some point during his initial statement to police, defendant was given *Miranda* warnings, but proceeded to speak. There is nothing in the record that would lead to a conclusion that defendant's subsequent silence, where he was "just sittin' there and a lot of things were running through [his] head," amounted to an assertion of his constitutional right to remain silent or a revocation of his earlier waiver of his rights. Indeed, after the extended period of silence, defendant voluntarily proceeded to make further statements to the officer. Looking at the totality of the circumstances, we cannot conclude that the silence was attributable to defendant's invoking his Fifth Amendment privilege or relying on his *Miranda* right to remain silent. *Id.* at 201, 211-212. Therefore, because defendant's silence was not a constitutionally protected silence, it was proper for the prosecutor to comment upon this period and to suggest that defendant was not credible and used that

time to “think up” a story which would exonerate him from criminal responsibility. This argument comports with defendant's own testimony that he was "just sittin' there and a lot of things were running through [his] head." Accordingly, we conclude that defendant was not denied a fair trial as a result of the prosecutor's comments because they did not impermissibly infringe upon defendant's right to remain silent.

IV

Defendant claims that the trial court abused its discretion by denying his motion for a mistrial, which was based on his argument that the prosecutor improperly shifted the burden of proof during rebuttal argument. Defendant contends that the prosecutor's comments about defendant's failure to produce witnesses were impermissible. We disagree. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Wolverson*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion will be found only where the trial court's denial of the motion has deprived defendant of a fair and impartial trial. *Wolverson*, *supra* at 75.

In his closing, defendant reiterated his version of the events on the evening of the crimes, including that he played basketball, went to his mother's apartment, and met up with Antwan Thompson and another person, named J.B., who defendant claims committed the crimes. In rebuttal, after arguing that codefendant offered no assistance to find witnesses who could substantiate some of his testimony, the prosecutor implied that defendant's version of the facts could also not be verified, that the alleged witnesses who could verify defendant's story were absent, and that there was no testimony to support defendant's alleged facts. The prosecutor then argued that defendant and codefendant were being intentionally vague with information. Our review of the record demonstrates that the prosecutor was only attempting to attack defendant's credibility.

Because defendant actually testified at trial, the prosecutor's comments about the identity and lack of testimony of alleged witnesses did not burden defendant's right not to testify, and thus, did not shift the burden of proof. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). A prosecutor may comment on a defendant's failure to call witnesses to support his defense or alternate theory if he is doing so to test the defendant's credibility. *Id.* at 112, 115. See *People v Gant*, 48 Mich App 5; 209 NW2d 874 (1973) where this Court indicated that a prosecutor is allowed to offer a rhetorical argument regarding a defendant's failure to produce witnesses who could corroborate his story. This argument or comment does not shift the burden of proof:

This approach [comment by the prosecutor on the defendant's failure to call witnesses to support his defense] does not cast the burden upon defendant to prove his innocence since defendant cannot be convicted upon the basis that he failed to affirmatively prove his defense. The circumstantial evidence resulting from defendant's failure to offer evidence and witnesses to support a proffered defense is no substitute for the prosecutor's burden to prove defendant guilty beyond a reasonable doubt. In spite of this failure, defendant cannot be convicted unless the prosecution has carried its burden of proof on every element of the crime charged. While defendant is free to offer to the jury a defense supported only by his testimony, the nonproduction of other evidence,

known and available to defendant, provides the jury with yet another fact for use to test his credibility. [*Fields, supra* at 112, citing *Gant, supra* at 9-10.]

The prosecutor's argument in this case related to the absence of witnesses, who were injected into the case by the defendant himself and provided an alternate theory as to who perpetrated the crimes. The argument inferred that defendant's version of the facts lacked credibility. To that extent, the argument was proper. See *Fields, supra* at 107-108.

We also note that defendant was not denied a fair trial. The prosecution, when making its argument, reminded the jury that it had the burden of proof. In addition, the trial court instructed the jury that, although comments were made regarding defendant's failure to produce witnesses, defendant was not required to prove his innocence. The court also instructed the jury that defendant was presumed innocent and that the burden was on the prosecutor to prove his guilt beyond a reasonable doubt. These instructions adequately informed the jury that the burden was on the prosecution and not on the defense. The trial court did not abuse its discretion in denying the motion for a mistrial.

V

Finally, defendant argues that he was denied a fair trial because neither the prosecutor nor the police disclosed the existence of defendant's tape-recorded exculpatory statement to defense counsel before trial. Defendant contends that he is entitled to a new trial because the nondisclosure deprived him of a powerful tool with which to cross-examine and impeach Sergeant Warren, a crucial witness in the case. We disagree.

A criminal defendant has a due process right to obtain evidence in the prosecutor's possession which is favorable to the defendant and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Where, as here, there is no indication that defendant made a discovery request for exculpatory information or where a defendant gives the prosecutor only a general request for all exculpatory information, error requiring reversal occurs only if the omitted evidence was material. *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Exculpatory evidence is material if it would raise a reasonable doubt that would not otherwise exist without the evidence. *Canter, supra* at 569, citing *United States v Agurs*, 427 US 97, 112-113; 96 S Ct 2392; 49 L Ed 2d 342 (1976). In determining materiality, "the omission must be evaluated in the context of the entire record." *Id.* "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Id.*

Based on this standard, we conclude that a new trial is not warranted. At trial, both defendant and Sergeant Warren testified extensively regarding the substance of defendant's exculpatory statement during which he denied all criminal responsibility. Because the evidence was before the jury, we do not believe that the production of the non-transcribed tape would have raised a reasonable doubt regarding defendant's guilt. Sergeant Warren did not rely on the tape at all, but only relied on his notes, which were made during the interview with defendant. Moreover, because the substance of defendant's statement was elicited at trial, defense counsel was provided with sufficient opportunity and information to effectively cross-examine Sergeant Warren about the contents of the statement. And, we note that,

when defendant learned about the tape during trial, he never requested that it be produced, or that he be granted relief because it was not produced. Defendant has failed to show that the tape contained information material to his case. Further, defendant is not entitled to a remedy for the prosecution's nondisclosure where defendant, having made the statement himself, presumably knowing that it was being taped, had knowledge of the tape independent of discovery. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987).

Affirmed.

/s/ Janet T. Neff

/s/ Michael J. Kelly

/s/ Harold Hood

¹ Defendant was also charged with assault with intent to rob while unarmed, MCL 750.89; MSA 28.284, and felony-firearm, MCL 750.227b; MSA 28.424(2) as to Carl Boris, but was acquitted of both charges at trial.

² A review of the transcript reveals that while defendant initially included this instruction in his proposed jury instructions, he withdrew this request during a discussion about jury instructions. Defendant then failed to object to the instructions as given.

³ See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).